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A CHAPTER OF LEGAL HISTORY IN MASSACHUSETTS.

THE matter of which I shall write has to do with the competency of witnesses. The main features of the common-law doctrine on this subject, the general course of its development, and the fact of its substantial disappearance in England and elsewhere, are fairly well known. To these matters, therefore, and the history of them, I need merely allude, — to the ancient common-law jury, at once witnesses and triers; to their necessary qualifications, determined by those of witnesses in the canon law;[1] to the slow coming in and the strange development of the practice of receiving witnesses to testify to these juries;[2] to the simple beginnings of the rules relating to the disqualification of these new witnesses, not at all identical with the disabilities of the civil or canon law, and so not the same as those of jurymen, but originating quite naturally in the requirement of an oath, in natural incapacity, in proved untrustworthiness, and in great and obvious danger of perjury; to the working out of these rules in the course of the seventeenth and eighteenth centuries into technical details which greatly perplexed the administration of justice; to the advent of Bentham, and his keen and truculent attacks upon the system;[3]

[1] Glanville, II. c. 12; Bracton, p. 185; Ayliffe, Parergon Jur. Can. Angl. (1st ed.), 536; Oughton, Ord. Jud. (1738) 156; 3 Bl. Com. 361–364.

[2] 5 HARVARD LAW REVIEW, 249, 295, 357.

[3] The first publication of his writings on this subject was in Paris in 1823. *Traité des Preuves Judiciales. Ouvrage extrait de M. Jérémie Bentham, Jurisconsulte Anglais,*

and finally to the melting away in England of almost the whole fabric, under the attacks of Bentham and his followers, during the period between 1833 and 1853 inclusive. Of all these things I will merely remind the reader, and will pass on.

In Massachusetts, as regards the competency of witnesses, we have had for nearly twenty-five years as clean a sheet, probably, as the world affords. The law stands thus: [1] "No person of sufficient understanding, whether a party or otherwise, shall be excluded from giving evidence as a witness in any proceeding, civil or criminal, in court, or before a person having authority to receive evidence, except in the following cases: First. Neither husband nor wife shall be allowed to testify as to private conversations with each other. Second. Neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint, or other criminal proceeding, against the other. Third. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him." I take this from the Public Statutes of Massachusetts, the compilation now in use. It varies from the original statute of 1870 only by the insertion, in the first line, of the words, "whether a party or otherwise." These provisions do not apply to "the attesting witnesses to a will or codicil," — a class of persons, it will be observed, who are required in order to constitute the document, and not merely to give evidence in court.

Although this statute uses the words, "except in the following cases," the cases named are really not exceptions. The first provision as to husband and wife is only a limitation of the range of their testimony; the second secures a privilege; and the third, relating to accused persons, like the second merely secures a privilege.

It may be well to add that the Massachusetts statute also provides that conviction of a crime (any crime) and disbelief in a God may be given in evidence to affect a witness's credit; that

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par Et. Dumont, etc. 2 vols. This appeared in an English translation in 1825; and in 1827, John Stuart Mill's edition of Bentham's entire treatise on "The Rationale of Judicial Evidence" was published, in five volumes. It takes a good deal of courage to read it.

[1] Stat. 1870, c. 393, s. 1; approved June 22. Pub. St. Mass. c. 169, s. 18.

a party calling his adversary as a witness shall have "the same liberty in the examination of such witness as is allowed upon cross-examination;" and that "the usual mode of administering oaths now practised here, with the ceremony of holding up the hand [no book being used] shall be observed; . . . [yet] when a person declares that a peculiar mode of swearing is, in his opinion, more solemn and obligatory than by holding up the hand, the oath may be administered in such mode."[1] A Quaker may "solemnly and sincerely affirm, under the pains and penalties of perjury," and so may any one who declares (and satisfies the court) that "he has conscientious scruples against taking any oath;" and so *must* he who is "not a believer in any religion." He who believes in a religion other than the Christian, "may be sworn according to the peculiar ceremonies of his religion, if there are any such."[2]

In Massachusetts then, all the common-law grounds of witness-exclusion have disappeared: lack of religious belief, pecuniary interest, being a party to the suit or a party's husband or wife, and conviction of an infamous crime; — all, except the lack of natural capacity.

1. As to religious belief and the oath. In this respect, as in others, the change was slow. The two colonies, at Plymouth and Massachusetts Bay, were much distressed by two peculiar classes of people, Quakers and Indians. They regarded the first of these for a long time as the worst sort of intruders, as bringers of a sort of spiritual small-pox; and struggled to be wholly rid of them. To relieve them from the pressure of any hardship, by dispensing, for example, with the necessity of an oath, would have been the last thing likely to be thought of; the effort was to drive them out. In England the Quakers had some relief as early as 1695. It had been found there, after a long contest, that the Quaker was a sort of person who could not be killed off, or put

[1] This clause covers the case of some Roman Catholics. See the explanation of the court to Bishop Fenwick, when he inquired why it was proposed to adopt in his case a method different from the usual one: viz. "It is well understood, as matter of general notoriety, that those who profess the Catholic faith are usually sworn on the Holy Evangelists, and generally regard that as the most solemn form of oath, and for this reason alone that mode is directed in this court, in case of administering the oath to Catholic witnesses. This is done by the witness placing his hand upon the book whilst the oath is administered, and kissing it afterwards." The Reporter adds; "The oath was then administered to Bishop Fenwick in this form." Com. *v.* Buzzell, 16 Pick. 153, 156 (1834).

[2] Pub. St. Mass., c. 169, ss. 13–31 inclusive.

down, or driven out; he had to be lived with. Here it took longer to find that out. Such well-intending people as these would indeed, here and there, melt in among their neighbors, like other people; and it seems to have required some effort on the part of the authorities to adhere to the orthodox view about them. While, therefore, in the Plymouth Colony, in 1657 and 1658, laws were passed prohibiting and punishing the bringing in or entertaining of Quakers, laws of the same period appear to have recognized some of them as freemen. And although in 1661 several penalties, including whippings, were again imposed on new-comers, yet in 1681 it was enacted, on petition of "several of the ancient inhabitants of the town of Sandwich, called Quakers," that they should have "liberty to vote in the disposal of such lands, and . . . to vote for the choice of raters, and shall be capable of making of rates, if legally chosen thereunto by the town and persons aforesaid, so long as they carry civilly and not abuse their liberty." [1]

Quakers, like all others, were early required in the Plymouth colony to take the oath of allegiance, "the oath of fidelity" as it was called, and on refusal were, at first, ordered to leave, and afterwards regularly fined, on being summoned "at each election," five pounds on each refusal.[2] It was not until 1719, long after the union of the colonies, that Quakers were allowed to substitute for the oath a solemn declaration of allegiance.[3] On March 5, 1743–4, by a law limited to three years Quakers were, for the first time, allowed, "upon any lawful occasion," instead of taking an oath, to "solemnly and sincerely affirm and declare under the pains and penalties of perjury;" but they could not do this in criminal cases, as witnesses or on any juries, nor could they, in general, hold any office where an oath was then required.[4] This law was afterwards renewed for ten years, and, in 1759, it was permanently enacted and made applicable also to criminal cases.[5] Finally, by Stat. 1810,

[1] Plym. Col. Rec., vi. 71. In following the course of events, it may be well to notice that George Fox, the Founder of the Quakers, was born in 1624, and began to preach about 1648.

[2] Plym. Col. Laws, 76, 130.

[3] Province Laws, ii. 155.

[4] Province Laws, iii. 126. It is interesting to see by other parts of this statute that provisions had become necessary for cases when a majority or all of "the assessors or collectors of any town" shall be Quakers.

[5] Province Laws, iv. 180. A passage from the diary of Chief Justice Lynde as to a case before him in Nantucket in July, 1737, shows that Quakers then served on grand

c. 127 (February, 1811), Quakers were allowed to affirm on all occasions.

How was it with him who was not a Quaker, but had like scruples? After the familiar way of legislators, no general principle was applied till later. Probably there were few cases of trouble. One such occurred as late as 1815,[1] when Judge Story committed for contempt a witness, not a Quaker, who refused from conscientious scruples to take the oath. It was the St. 1824, c. 91 (P. S. c. 169, s. 16), which first allowed to others the liberty earlier gained by the Quakers, whenever "required to take any oath on any lawful occasion." The constancy of that God-fearing people had its final victory at last, in working out freedom of conscience for all.

The case of that other class of persons mentioned above, the native Indians, was also a troublesome one. They could not be expelled; they also must be lived with. The religious condition of these people, "the veriest ruins of mankind upon the face of the earth," as one of the clergy called them, was a puzzle to the colonists.[2] Saving the scanty converts, they seem to have been regarded either as wholly destitute of religion or as worshippers of false gods, and even of that peculiarly dangerous false god, the devil.[3] How could an oath be administered to such persons? Could the Pilgrim or the Puritan allow before his magistrates the invocation of Baäl or of Satan? or the swearing in of one who knew no God at all?

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juries; and in some cases, apparently, without taking the oath: "13th Wednesday, in the morning about ten, in Mr. White's meeting-house, began the trial of Abia. Comfort, an Indian woman, against whom a bill of indictment was drawn up and presented . . . to the Gr. Jury, whereof Joseph . . . was appointed foreman, with eleven more Englishmen, but he and most Quakers; yet on the Court's having their hats off, and manifesting the decency of their's too, they, some of themselves, and others easily submitted to their being taken off, and had the Gr. Jury's oath or declaration administered to them, some holding up their hands."

[1] U. S. *v.* Coolidge, 2 Gallison, 364. A similar case in England is mentioned as occurring in 1854. Powell, Evidence (3d ed.), 29.

[2] Palfrey, Hist. New Eng. i. 43–50.

[3] "And it is ordered that no Indian shall at any time *Powaw* or perform outward worship to their False Gods or to the Devil, in any part of our jurisdiction, whether they shall be such as shall dwell here or shall come hither; and if any shall transgress this law, the *Powawer* shall pay five pounds, the procurer five pounds, and every other countenancing by his presence or otherwise (being of age of discretion), twenty shillings; and every town shall have power to restrain all Indians that shall come into their towns from profaning the Lord's day." This was a Massachusetts statute of 1633, preserved in the "Laws of 1660" (Whitmore's ed., Boston, 1889), Part II., 163. A similar provision is found in the Plymouth Col. Laws, 298, "Laws of 1671."

Evidently not. And yet there was constant occasion for Indian testimony. For example, Zachariah Allin, of the Plymouth Colony, was convicted, in 1679, "by the testimony of sundry Indians," of having supplied them "with some quantities of strong liquors."[1] Although this was a trial by jury, yet it is expressly said to have been according to "Chapter 14th of our Book of Laws, section the 7th." Turning to this[2] we find that "It is ordered that the accusation, information, or testimony of any Indian or other probable circumstance, shall be accounted sufficient conviction of any English person or persons suspected to sell, trade, or procure any wine, cider, or liquors above said, to any Indian or Indians, unless such English shall, upon their oath, clear themselves from any such act of direct or indirect selling; . . . and the same counted to be taken for conviction of any that trade any arms or ammunitions to the Indians." This procedure was enacted in the Massachusetts Colony in 1666, in the Plymouth Colony in 1667, and later in the Province, in 1693–4.[3] While, as in Allen's case, it might be combined with a jury trial, this was really "trial by oath," a very ancient thing.[4] A touch of it may be seen, in Massachusetts, under a statute relating to usury, Stat. 1783, c. 55, as explained by Shaw, C. J., in Little *v.* Rogers, 1 Met. 108, 110 (1840).

What was thus called in the books Indian "testimony," was probably not under oath. In the sort of case just referred to, the Indian merely made a criminal accusation. How was it in civil cases? An answer is found in a Plymouth law of 1674,[5] where, after reciting that many controversies arise between English and Indians, and that Indians "would be greatly disadvantaged if no testimony should, in such case, be accepted but upon oath," "it is ordered that any court of this jurisdiction before whom such trial may come, shall not be strictly tied up to such testimonies on oath as the common law requires, but may therein act and determine in a way of Chancery, valuing testimonies not sworn on both sides according to their judgment and conscience." In March 1679–80, in Dexter & wife *v.* Lawrance, (7 Plym. Col. Records, 222, 223) in an action of trespass on land of the female plaintiff, purchased

[1] Plym. Col. Records, vii. 242, 247.

[2] Plym. Col. Laws, 290; Plym. Col. Rec., xi. 234, 235.

[3] Plym. Col. Rec., xi. 219, 256; Plym. Col. Laws, 152; 4 Mass. Rec., Part II., 297; Whitmore's edition of Mass. Laws of 1660 and Supplements, Part II., 236; 1 Prov. Laws, 151.

[4] 5 HARVARD LAW REVIEW, 57–63.

[5] Plym. Col. Records, xi. 236; Plym. Col. Laws, 171.

by her of an Indian, the jury's verdict ran thus: "If Indian testimony be good in law, we find for the plaintiff five shillings damage and the cost of the suit; but if not good in law, we find for the defendant." It is added: "The charges of the suit is three pound, which was ordered by the court to the plaintiff." It seems a fair interpretation that this means judgment for the plaintiff, and so a holding that "Indian testimony" was good in law. It will be observed that the suit was between white persons, and that the statute related only to controversies between whites and Indians.[1]

In Smith *v.* Freelove (7 Plym. Col. Rec. 255, 256), in 1682, in an action of trespass relating to Hog Island in Plymouth, while John Alden, "aged eighty-two years, . . . being one of the first comers into New England to settle at or about Plymouth, which now is about sixty-two year since," in giving his testimony is regularly sworn, — four "ancient Indians . . . do affirm and testify" merely, the magistrate certifying that these "testimonies was subscribed to and declared to be the real truth."

There are instances, and probably many of them, in the court records of the Province, in the eighteenth century, where Indian testimony was introduced. In some the memorandum is added, "Sworn in court," and "Attested in court." In some it is merely described as "testimony." And again, as in the deposition of "Hepsabe Seeknout, widow of Joshua Seeknout, late Sachem of Chappaquiddick, dated Oct. 1, 1717, it is said to be "taken in court and spoken as in the presence of God." We may observe this same form of injunction formerly given in England to witnesses brought forward by one on trial for treason or felony, none of whom could be sworn until 1695, in high treason, and 1702 in felony.[2] "Look you here, friend," said Chief Justice North, in 1681, at the trial of College for high treason, when the accused called one of his witnesses, "you are not to be sworn; but when you speak in a court of justice you must speak as in the presence of God, and only speak what is true."[3]

It may be added, that in criminal trials and inquests where

[1] In Rhode Island, in 1673, the General Assembly, after directing the trial of an Indian charged with murdering another Indian, by a jury of "six Englishmen and six Indians," ordered "that, in all cases of this nature wherein one Indian hath a complaint against another Indian, the testimony of an Indian may be taken, and in the judgment of the jury to accept or refuse the evidence as it were the testimony of an Englishman." — 2 R. I. Col. Rec. 509.

[2] Stat. 7 Wm. III. c. 3, and Stat. 1 Ann, c. 9; 2 Hale, Pl. Cr. 283.

[3] 8 How. St. Tr. 626.

Indians were concerned, there was a common practice of adding Indians to the jury, much as witnesses to deeds were added to juries in the old days of the English law, but for a different reason.[1] In June, 1675, in the Plymouth Colony, three Indians were tried for the murder of another Indian and convicted. The names of the twelve jurors are given,[2] and it is added: "It was adjudged very expedient by the court that together with the English jury above named, some of the most indifferentest, gravest, and sage Indians should be admitted to be with the said jury, and to help to consult and advise with, of, and concerning the premises. [Then follow their names.] These fully concurred with the above written jury." The verdict was guilty; it began: "We of the jury, one and all, both English and Indian, do jointly and with one consent agree upon a verdict," &c.[3]

While converted Indians might of course be sworn, it is, I believe, matter of conjecture how far, if at all, unconverted Indians were formerly admitted to the oath in Massachusetts. They were either "worshippers of false gods" or atheists. The latter could not testify here until 1859. The former, after the case of Omichund *v.* Barker,[4] in 1744–45, might have testified under the forms recognized in their religion, when they had any; and it may be that a search in our Judicial Records under the Province will reveal instances of that practice. I know of no clear case.[5]

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[1] 5 HARVARD LAW REVIEW, 302.

[2] 5 Plym. Col. Rec. 168.

[3] A like case, in 1682, is found in Plym. Col. Rec. vi. 98, the case of an Indian indicted for rape on a white girl. The names of the twelve jurymen are given; "unto which English jury four Indian men present were added, viz;" etc. In Chief Justice Lynde's Diary, under date of June 14th, 1732, he speaks of holding court at Nantucket with a "grand jury of eighteen, a 3d Indians." Bills of indictment against several Indians were under investigation. Again, on July 13, 1737, it appears that the grand jury of twelve, mostly Quakers, above mentioned (p. 4, n. 5), had also four Indians added to their number, and they found *billa vera* against an Indian woman charged with murder for concealing the death of a bastard child.

[4] 1 Atk. 21; s. c. 2 Eq. Cas. Ab. 397; Willes, 538.

[5] The opportunity for such a search will soon exist when the thorough and admirably devised work of collecting, arranging, and indexing our early judicial records, now going forward under the direction of John Noble, Esq., Clerk of the Supreme Judicial Court for the County of Suffolk, shall have been completed. To his courtesy I am indebted for a number of the references here used. I must not omit to mention that courts were established among the Indians, in some cases, at their request, and Indians were appointed to try small causes among their people. Mass. Records, ii. 188 (1647). Chief Justice Lynde in his Diary (p. 28) speaks of visiting an Indian magistrate at Nantucket, in 1732, — Corduda, "a good and strict old man." It is not necessarily to be concluded that any oath was administered to the unconverted. But I observe

In Omichund *v.* Barker, it was declared to be the common law of England that heathens (in that case, native Hindoos) might testify when sworn according to the forms and ceremonies required by their own religion; on the principle that no more was essential for an oath, than that witnesses should "believe in a God, and that he will punish them if they swear falsely." [1] The doctrine was there laid down that it was not necessary to believe in a future existence, but only in a God who will punish in the present state; that greater credit might be given to a witness who believed in divine punishments hereafter; [2] and that "such infidels, if any such there be, who either do not believe in a God,[3] or, if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses in any case nor under any circumstances." This case, therefore, disposed of all difficulties, growing out of the form of the oath, or the ceremonies accompanying it, in the case of all sorts of persons whose religious belief made them amenable to any kind of an oath.

It is to be remembered, of course, that before the case of Omichund *v.* Barker, and even long before it, the practice of the courts may have conformed to the doctrine there laid down. That case itself only confirmed the action of Lord Hardwicke in ordering the taking of a deposition in 1739. And another instance of the same sort in the Privy Council is reported by Sir John Strange, as of Dec. 9, 1738.[4] "On a complaint of Jacob Fachina against General Sabine as Governor of Gibraltar, Alderman Ben Monso, a Moor, was produced as a witness and sworn upon the Koran. I made no objection to it." [5]

After the Revolution,[6] a statute was passed that "In the administration of oaths in this Commonwealth, the ceremony of lifting up

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that where Indians were a part of coroners' juries, upon the death of an Indian, the verdict in some cases expressly says that it is under oath, and no qualification is made as to the Indians. Such a case occurred at Barnstable in 1720, and at Yarmouth about the same time. It may be conjectured that, as time went on, Indians would generally be admitted to the oath when they did not object, on a presumption of their being converted, or, at any rate, of their recognizing its obligation.

[1] *Per* Willes, C. J., Willes Rep. at p. 549.

[2] And so Hunscom *v.* Hunscom, 15 Mass. 184 (1818). Compare the note to that case, as to the English law.

[3] So Thurston *v.* Whitney, 2 Cush. 104.

[4] 2 Strange, 1104.

[5] Compare a case of swearing a Jew on the Old Testament, in 1667–8, Robely *v.* Langston, 2 Keble, 314.

[6] Stat. 1797, c. 35, s. 10.

the hand, as heretofore used, shall be practised, with such exceptions as to Mahometans and other persons who believe that an oath is not binding unless taken in their accustomed manner, as the several courts shall find necessary in the execution of the laws." The practice under this statute appears to have been liberal, and to have followed that of the English court in Colt *v.* Dutton, 2 Sid. 6 (1657), in allowing a variation from the common form, not merely where this was thought not binding, but where it was thought less solemn. And so the court was able to answer the Roman Catholic Bishop as it did in 1834.[1] This practice was sanctioned by Rev. Stat. c. 94, s. 8 (Nov. 1835), allowing it "when the court . . . shall be satisfied" of a witness's belief as to the greater solemnity of another form, — changed by Stat. 1873, c. 212, s. 1, to "when a person . . . shall declare."[2]

Regarding the Indians as atheists, they would regularly have been wholly excluded from giving testimony; for atheists, as I have said, were not admitted to testify in this State until the enactment of the General Statutes (Dec. 28, 1859), where it was provided (c. 131, s. 12; now Pub. St. c. 169, s. 17), that "every person not a believer in any religion shall be required to testify truly under the pains and penalties of perjury."[3] But the politic and sensible arrangements about Indians which were actually adopted have been already stated. For such an exception there was not only the usage as to the witnesses of persons accused of high treason or felony, mentioned above (p. 7), but there was the nearer analogy of children too young to take an oath, in rape cases.[4] This practice as to young children was, indeed, declared bad, by a divided court, in Powell's Case, Leach (4th ed.), 110 (1775), and by a unanimous court in Brasier's Case, ib. 199 (1779). But it has recently been revived in England, by statute, in a similar class of cases.

2. Passing from the oath and the religious disabilities to those arising from a pecuniary interest in the litigation and from legal

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[1] Com. *v.* Buzzell, 16 Pick. at p. 156; *supra*, p. 3, n. 1. Compare Vail *v.* Nickerson 6 Mass. 262 (1810) and Bonnier, *Preuves* (4 ed.), i. ss. 420, 424.

[2] And so now in Pub. Stat. c. 169, s. 14. Rev. Stat. c. 94, s. 11, had also introduced the express provision previously mentioned, that believers in any other than the Christian religion might be sworn according to any peculiar ceremonies of their religion.

[3] In England, this was partly accomplished in 1854 by Stat. 17 and 18 Vict. c. 125, s. 20; it was completed in 1869, by Stat. 32 and 33 Vict. c. 6, s. 4. See the later comprehensive statute of 1888, Stat. 51 and 52 Vict. c. 46.

[4] 1 Hale, Pl. Cr. 634; 2 ib. 279.

infamy, — these[1] were for the first time attacked and dealt with together in 1851, in the first Massachusetts Practice Act, a statute bringing about extensive reforms in civil procedure at common law. A commission, appointed in 1849 by the Governor, in pursuance of a joint legislative resolve of the same year, moved by B. R. Curtis, then a member of the Massachusetts House of Representatives. and consisting of himself, R. A. Chapman, afterwards Chief Justice of the State, and N. A. Lord, another distinguished lawyer, in a report of permanent value, addressed to the legislature of 1851, recommended, among many other things, the abolition of the disqualification of witnesses for crime or interest.[2] The commissioners were unwilling to admit parties to testify, but they proposed allowing the examination of parties, before the trial, upon written interrogatories. In making their propositions as to crime and interest, they said, referring to the English legislation of 1843, "We have been a good deal influenced by the course of legislation in England." At that time a measure for allowing parties to the litigation to testify had been pending in Parliament for two years, but was not yet adopted. It passed, however, in England, almost immediately afterwards, in the very year, 1851,[3] which saw the enactment of the commissioners' recommendations in Massachusetts. This Practice Act of 1851 (c. 233) was repealed the next year, in order to change some matters of detail, but was mainly reenacted as Stat. 1852, c. 312; and in all respects material to the present discussion the two statutes were the same.[4]

3. The case of parties to the suit in civil proceedings was not disposed of until 1856. The Stat. 1856, c. 188, made them competent and compellable in all cases, with qualifications which were abolished from time to time. The case of the husband and wife of the party to a civil suit was dealt with in the Stat. of 1857, c. 305, and in later ones;[5] but the present simple rule which makes the husband or wife of a party competent and compellable in all civil proceedings, and competent but not compellable in all criminal proceedings, was not adopted till the Stat. 1870, c. 393.

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[1] Abolished in England by Lord Denman's Act in 1843, Stat. 6 and 7 Vict. c. 85.

[2] Hall's Mass. Practice Act of 1851, 150–156.

[3] Stat. 14 and 15 Vict. c. 99. And see Stat. 32 and 33 Vict. c. 68 (1869).

[4] As regards interrogatories to parties before the trial, this convenient introduction of equitable discovery into common-law practice had long been known in some other States of this country. In England it was not introduced until 1854 by the Stat. 17 and 18 Vict. c. 125, s. 50 *et seq.*

[5] In England, in 1853, by Stat. 16 and 17 Vict. c. 83.

4. The admission of the accused person in all criminal proceedings, with the qualifications stated before (*supra*, p. 2), was allowed by Stat. 1866, c. 260. This remarkable inroad upon the common law had been first made in Maine by a statute of 1864, c. 280; and it has long been the law in most of our States. It was introduced in the Federal jurisdiction by a statute of March 16, 1878.[1]

The enactment in Maine of this sensible and very important change, not yet accomplished in England, is understood to have been principally due to the efforts of Chief Justice Appleton, an early disciple of Bentham, and author of a little treatise on Evidence, published in 1860. This book was largely a reprint of an early set of articles published thirty years earlier in the American Jurist,[2] eagerly advocating the English reformer's views. It was mainly Bentham's influence working through younger men, such as Denman, Brougham, and Taylor, the writer on Evidence, that overthrew so rapidly in England the system of witness exclusion. It was the English example that moved us. And as we see, it was the same powerful influence of Bentham that has finally carried the reform on this side of the water to a point not yet reached in his own country.[3]

James Bradley Thayer.

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[1] 20 U. S. Stat. at Large, 30.

[2] Beginning in Vol. IV. p. 286.

[3] "I do not know," says Sir Henry Maine, "a single law reform effected since Bentham's day which cannot be traced to his influence." Early History of Institutions (London, 1880), 397.